

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	CG Docket Nos. 02-278, 18-152
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	DA 18-1014
	)	

**Comment of Professional Association for Customer Engagement**

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## I. Introduction

The Professional Association for Customer Engagement (“PACE”)<sup>1</sup> submits this Comment in response to the Public Notice<sup>2</sup> issued by the Federal Communications Commission (“Commission”) seeking further comment on interpretation of the Telephone Consumer Protection Act<sup>3</sup> following the decision of the U.S. Court of Appeals for the Ninth Circuit in *Marks v. Crunch San Diego, LLC*.<sup>4</sup> Specifically, the Commission seeks input on how it should interpret and apply the statutory definition of “automatic telephone dialing system” (“ATDS”), including the phrase “using a random or sequential number generator.”<sup>5</sup> PACE respectfully submits that, contrary to *Marks*, the statutory definition of an ATDS is unambiguous and requires that an ATDS have the capacity to automatically dial telephone numbers generated using a random or sequential number generator.

## II. Definition of an ATDS

### A. Background

The TCPA defines an ATDS as “equipment which has the capacity-- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”<sup>6</sup> Congress narrowly tailored the statute to address concerns that “telemarketers typically used autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings.”<sup>7</sup> Random and sequential dialing presented public policy concerns because callers reached and tied up unlisted and specialized numbers.<sup>8</sup>

The Commission acknowledged the limited scope of the TCPA in a 1992 Order wherein it held that phone systems with speed dialing, call forwarding, and similar functionalities are not ATDSs “because the numbers called are not generated in a random or sequential fashion.”<sup>9</sup> Three

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<sup>1</sup> PACE is the only non-profit trade organization dedicated exclusively to the advancement of companies that use a multi-channel contact center approach to engage their customers, both business-to-business and business-to-consumer. These channels include telephone, email, chat, social media, web, and text. Our membership is made up of Fortune 500 companies, contact centers, BPOs, economic development organizations and technology suppliers that enable companies to contact or enhance contact with their customers.

<sup>2</sup> Public Notice: Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the *Ninth Circuit’s Marks v. Crunch San Diego, LLC* Decision, FCC, CG Docket Nos. 02-278, 18-152, DA 18-1014 (October 3, 2018) (“Public Notice”).

<sup>3</sup> 47 U.S.C. § 227.

<sup>4</sup> *Marks v. Crunch San Diego, LLC*, 2018 U.S. App. LEXIS 26883 (9<sup>th</sup> Cir. 2018).

<sup>5</sup> Public Notice at 2.

<sup>6</sup> 47 U.S.C. § 227(a)(1); *see also* 47 CFR 64.1200(f).

<sup>7</sup> *Dominguez v. Yahoo, Inc.*, 629 F. App’x 369, 372 (3d Cir. 2015).

<sup>8</sup> *See e.g.*, S. Rep. No. 102-178, at 2 (1991); *see also* H.R. Rep. No. 102-317, at 10 (1991).

<sup>9</sup> Report and Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, ¶ 47 (1992) (1992 Order).

years later it explained that the TCPA's ATDS provisions do not apply to calls "directed to [a] specifically programmed contact numbe[r]" rather than "to randomly or sequentially generated telephone numbers."<sup>10</sup>

In 2003, the Commission changed course by holding that a predictive dialer is an ATDS because it can "dial numbers without human intervention."<sup>11</sup> This interpretation impermissibly expanded the definition of ATDS by reading the "using random or sequential number generator" language out of the statute.<sup>12</sup> Moreover, the 2003 Order created significant confusion because, in addition to the "human intervention" test, it suggested alternative tests to determine whether a system is an ATDS.<sup>13</sup> The Commission reaffirmed its predictive dialer ruling in orders issued in 2008, 2012 and 2015.<sup>14</sup> In March of this year, the U.S. Court of Appeals for the District of Columbia Circuit vacated these prior ATDS definition interpretations in *ACA Int'l v. FCC*.<sup>15</sup> Courts are now left to interpret the statutory definition without being bound by the Commission's prior guidance.<sup>16</sup>

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<sup>10</sup> Memorandum Opinion & Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd. 12391, ¶ 19 (1995) ("1995 Order").

<sup>11</sup> Report and Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶ 132 (2003) ("2003 Order").

<sup>12</sup> Cf. *ACA Int'l v. FCC*, 885 F.3d 687, 702-703 (D.C. Cir. March 16, 2018) (In reference to the Commission's 2015 Order (cited below) reaffirming the 2003 Order: "So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? . . . But the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order.").

<sup>13</sup> 2003 Order at ¶¶ 131-32 (referencing a system's ability to dial from a database of numbers and/or "store or produce telephone numbers...using a random or sequential number generator").

<sup>14</sup> Declaratory Ruling, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, ¶¶ 12-14 (2008) ("2008 Order"); Declaratory Ruling, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 15391, ¶ 2 n.5 (2012) ("2012 Order"); Declaratory Ruling and Order, *In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72, ¶ 16 (July 10, 2015) ("2015 Order").

<sup>15</sup> *ACA Int'l*, 885 F.3d at 703. The D.C. Circuit also overturned the 2015 Order's broad reading of the term "capacity" as including potential functionalities.

<sup>16</sup> *Compare Marks, Marshall v. CBE Group, Inc.*, 2018 U.S. Dist. LEXIS 55223 (D. Nev. 2018), *Herrick v. GoDaddy.com LLC*, 2018 U.S. Dist. LEXIS 83744 (D. Ariz. 2018), *Sessions v. Barclays Bank Del.*, 2018 U.S. Dist. LEXIS 108453 (N.D. Ga. 2018), *Pinkus v. Sirius XM Radio, Inc.*, 2018 U.S. Dist. LEXIS 125043 (N.D. Ill. 2018), *Gonzalez v. Ocwen Loan Servicing, LLC*, 2018 U.S. Dist. LEXIS 153480, \*15 (M.D. Fla. 2018), and *Keyes v. Ocwen Loan Servicing, LLC*, 2018 U.S. Dist. LEXIS 138445, \*21 (E.D. Mich. 2018) (holding that the FCC's predictive dialer guidance is no longer valid) with *Reyes v. BCA Fin. Servs.*, 2018 U.S. Dist. LEXIS 80690 (M.D. Fla. 2018), *Swaney v. Regions Bank*, 2018 U.S. Dist. LEXIS 88568 (N.D. Ala. 2018), *McMillion v. Rash Curtis & Assocs.*, 2018 U.S. Dist. LEXIS 101700 (N.D. Ca. 2018), *Ammons v. Ally Fin., Inc.*, 2018 U.S. Dist. LEXIS 108588 (M.D. Tenn. 2018), *O'Shea v. Am. Solar Sol., Inc.*, 2018 U.S. Dist. LEXIS 110402 (S.D. Cal. 2018), and *Somogyi v. Freedom Mortg. Corp.*, 2018 U.S. Dist. LEXIS 129697 (D. N.J. 2018) (holding that the FCC's predictive dialer guidance remains valid and binding).

B. Marks's Erroneous Interpretation

The *Marks* court held that the ATDS definition is “ambiguous on its face” and may be interpreted by the court.<sup>17</sup> The court concluded that “the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a ‘random or sequential number generator,’ but also includes devices with the capacity to dial stored numbers automatically.”<sup>18</sup> In other words, the *Marks* court applied the phrase “using a random or sequential number generator” only to numbers “produce[d]” – not numbers “stored.”

To reach its erroneous conclusion, the *Marks* court overlooked the grammatical structure of the ATDS definition. As explained by the U.S. District Court for the Northern District of Illinois in *Pinkus v. Sirius XM Radio, Inc.*, the comma before “using” is an essential component of the definition and results in the exact opposite reading from *Marks*:

Like “produce,” “store” is a transitive verb, and so requires an object. And the object of the verbs “store” and “produce” is “telephone numbers to be called.” As a result, despite the disjunctive “or” linking “store” and “produce,” “store” is not a grammatical orphan, rather, like “produce,” it is tied to the object, “telephone numbers to be called.” The TCPA thus defines as an ATDS a device that has the capacity “[1] to store or produce [2] telephone numbers to be called” and then “to dial such numbers.”

But what kinds of numbers? Given its placement immediately after “telephone numbers to be called,” the phrase “using a random or sequential number generator” is best read to modify “telephone numbers to be called,” describing a quality of the numbers an ATDS must have the capacity to store or produce . . . The comma separating “using a random or sequential number generator” from the rest of subsection (a)(1)(A) makes it grammatically unlikely that the phrase modifies only “produce” and not “store[.]”<sup>19</sup>

Other courts have reached conclusions similar to *Pinkus*:

- *Herrick v. GoDaddy.com LLC* (D. Ariz. 2018): “Broadening the definition of an ATDS to include any equipment that merely stores or produces telephone numbers in a database would improperly render the limiting phrase ‘using a random or sequential number generator’ superfluous.”<sup>20</sup>
- *Gonzalez v. Ocwen Loan Servicing, LLC* (M.D. Fla. 2018): “Having considered the statute, this Court concludes that the definition of an ATDS would not include a predictive dialer

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<sup>17</sup> *Marks* at \*23.

<sup>18</sup> *Id.* at \*25.

<sup>19</sup> *Pinkus* at \*\*26-28 (internal citations omitted).

<sup>20</sup> *Herrick*, 312 F. Supp. 3d at 800.

that lacks the capacity to generate random or sequential telephone numbers and dial them; but it would include a predictive dialer that has that capacity.”<sup>21</sup>

- *Keyes v. Ocwen Loan Servicing, LLC* (E.D. Mich. 2018): “The better reading of the [TCPA], this Court will conclude, is that devices must be able to generate random or sequential numbers to be dialed to qualify as an ATDS. This approach tracks the statutory language.”<sup>22</sup>

As elucidated by *Pinkus* and the other decisions cited above, the statutory definition unambiguously requires equipment to be capable of performing at least three tasks. *First*, the equipment must be able to generate random or sequential numbers. Otherwise, it cannot have the capacity to do anything “using a random or sequential number generator.” *Second*, the equipment must be able to use that random or sequential number generator to store or produce telephone numbers to be called. *Third*, the equipment must be able to automatically dial the telephone numbers that were stored or produced “using a random or sequential number generator.”<sup>23</sup> Unless equipment can perform all three tasks it is not an ATDS.

To the extent the Commission believes the statutory language is ambiguous and should be interpreted, it should not follow *Marks’s* reasoning which rests on faulty premises. *First*, the *Marks* court appears to adopt *Marks’s* argument that a random or sequential number generator cannot be used to store telephone numbers.<sup>24</sup> As explained in more detail in Comments filed by Noble Systems, known dialer technologies at the time were able to produce a random or sequential number which was then immediately dialed, or produce a random or sequential number which was then stored into a file, and then the numbers in the file were dialed.<sup>25</sup> *Second*, the *Marks* court inferred that because Congress made amendments to the TCPA after the FCC’s prior ATDS interpretations and did not amend the statutory definition, then Congress “gave the interpretation its tacit approval.”<sup>26</sup> But this inference deserves little weight because Congress “cannot by its silence ratify an administrative interpretation . . . contrary to the plain meaning of the Act.”<sup>27</sup> *Third*, the *Marks* court argued that the TCPA’s exemptions for calls made with prior express consent would be superfluous unless predictive dialers are included in the ATDS definition because a caller would need to call numbers from a list in order to take advantage of

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<sup>21</sup> *Gonzalez* at \*15.

<sup>22</sup> *Keyes* at \*21.

<sup>23</sup> See *ACA Int’l*, 885 F.3d at 703 (stating “[The] ‘automatic’ in ‘automatic telephone dialing system ... would seem to envision non-manual dialing of telephone numbers.”).

<sup>24</sup> *Marks* at \*\*21, 27.

<sup>25</sup> Comments of Noble Systems, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-78, 18-152 at 12-16 (Oct. 16, 2018).

<sup>26</sup> *Id.*

<sup>27</sup> *Ashton v. Pierce*, 716 F.2d 56, 63 (D.C. Cir. 1983). To be ratified by Congress, an agency’s interpretation must have been “unequivocally established.” *United States v. Mendoza-Lopez*, 481 U.S. 828, 836 (1987).

the exemption;<sup>28</sup> however, as explained by *Pinkus*, a “it is possible to imagine a device that both has the capacity to generate numbers randomly or sequentially and can be programmed to avoid dialing certain numbers, including numbers that belong to customers who have not consented to receive calls from a particular marketer.”<sup>29</sup> In short, *Marks’s* fundamentally flawed assumptions undercut its reasoning.

### III. Conclusion

A system is not an ATDS simply because it can automatically call telephone numbers from a list—a function not covered by the statute. The statute defines an ATDS as a system that has the capacity to “generat[e]” “random or sequential number[s]” “to be called”; it does **not** define an ATDS as a system that has the capacity “to dial telephone numbers from a database.” As pointed out by Chairman Pai and Commissioner O’Rielly, the Commission should—indeed must—adopt an interpretation of ATDS functionality that reflects the actual language of the statute.<sup>30</sup> Accordingly, the Commission should reject *Marks* and adopt the *Pinkus* interpretation.

Respectfully submitted,



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<sup>28</sup> *Marks* at \*24.

<sup>29</sup> *Pinkus* at \*\*31-32.

<sup>30</sup> 2015 Order Pai Dissent at 8077 (“In short, we should read the TCPA to mean what it says: Equipment that cannot store, produce, or dial a random or sequential telephone number does not qualify as an [ATDS] because it does not have the capacity to store, produce or dial a random or sequential telephone number.”); 2015 Order O’Rielly Dissent at 8087 (“The order also impermissibly expands the statutory definition of an [ATDS] far beyond what the TCPA contemplated.”).